***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

BRIEF FOR APPELL[redacted]740

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 20,153

ROOSEVELT WRIGHT, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court
For the District of Columbia



A. YATES DOWELL, JR.

1345 Pennsylvania Ave., N. W.
Washington, D. C. 20004

Counsel for Appellant
(Appointed by this Court)

## STATEMENT OF QUESTIONS PRESENTED

Whether defendant's right to due process is denied where the identifying witness bases her identification on "picking" the Negro defendant out of a "line-up" consisting of his being seated in a room in which two Negro plain-clothes policemen are present, and being asked by the policemen to stand, immediately after the witness had seen the automobile used at the scene of the crime parked at the police station at which she made such identification.

Whether the Court's refusal to instruct the Jury that the defendant need not prove that another person may have committed the crime, where defendant had a corroborated and uncontradicted alibi, and the prosecuting attorney had ridiculed defendant's testimony that his brother's car had been moved (and hence used by someone else) for the crime, was reversible error under Salley v. U.S., 353 F2d 897 (US App DC, 1965).

Whether the evidence seized in the car of the suspect's brother should have been suppressed, defendant having submitted to arrest and being held in custody in the arresting officers' car, the arresting officers having the keys to the brother's car and no weapons being involved, under Preston v. U.S., 376 US 364 (1964).

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BRIEF FOR APPELLANT

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## TABLE OF CASES *



* Cases or authorities chiefly relied upon are marked by asterisks.

## JURISDICTIONAL STATEMENT

Jurisdiction to hear this appeal is vested by 28 USC 1291. There are no opinions below. Petitioner appeals from a criminal conviction in the U. S. District Court for the District of Columbia before the Honorable Joseph C. McGarraghy. The jury verdict was returned on February 10, 1966 (Tr 294); petitioner made timely appeal in forma pauperis; and this Court then appointed present counsel to represent petitioner.

## STATEMENT OF CASE

Petitioner was convicted (Tr 294) on a two-count indictment (TR 15) charging the crimes of housebreaking and grand larceny. The plea was not guilty.

The Government attempted to prove that petitioner, accompanied by an unidentified person, broke into the third floor apartment (Tr 37) of one Norma J. Sword, and stole a hi-fi set, records, and a couple hundred pennies which were kept in a piggy bank (prosecutor's opening statement, Tr 15-18; Sword 21-23). After coming out of the basement (Tr 38) and apparently placing the hi-fi set outside the building, the two men, according to

Government witness Lois M. Vines, got into a 1956 green Plymouth (2-door), with D.C. tag number 9 KG 30 and drove away. Mrs. Vines, who lived in and made her observations of the men on the street from her second floor apartment (Tr 37,38), directly below the Sword apartment, says the two men then returned and picked up the hi-fi set (Tr 37-45).

(a) Mrs. Vines was the Government's main witness. She wrote down the tag number during the incident, and later identified petitioner in what she testified was a "line-up" (Tr 45). After petitioner was arrested (see part c infra, p. 4), he was taken to Precinct No. 11 and placed in a room with some police officers. Mrs. Vines was brought by Officer Cass to the station to make an identification. As the police car carrying her drove up to the station, she saw the 1956 green Plymouth parked outside (Tr 131,132) and was then taken into the station to view petitioner. Adjacent to the room petitioner was occupying, is another room (Tr 170). She was with the police while in the adjacent room but their conversation was not brought out at the trial. She was then ushered in to see petitioner (Tr 56,57).

According to her answers to the Government's

leading questions, Mrs. Vines identified petitioner in a line-up (Tr 45). The "line-up" consisted of the following: (1) Petitioner, a Negro, dressed in undisclosed manner, was sitting in a chair. While Mrs. Vines was looking at him "the police had this man stand" and turn around (Tr 59, 62-64, 170,171). (2) All other persons in the room were police officers (Tr 172,173). (3) The only other Negroes in the room were two plain-clothes police officers (Tr 128) of undisclosed dress, height, bearing and physical position, and who were not directed to change position (Tr 170,171). (4) Petitioner is 6'2". Before the "line-up", Mrs. Vines described him as 5'8" to 6' (Tr 79,132). After the "line-up" -- at the trial -- she described him as "about 6'" (Tr 52,60) or "Possibly six feet" (Tr 45).

(b) Petitioner's defense to the charges was an alibi. He said he was with Carol Jackson and his family (Tr 103, 164,165), a story corroborated by the Jacksons (Tr 140,141, 153). The car, owned by his brother (Tr 161), he had left in front of the Jackson house (Tr 164), leaving the keys in the ignition (Tr 167). When he left the Jacksons, he noticed that the car had been moved to a

different spot (Tr 164-168, 180). Because the prosecuting attorney ridiculed petitioner's story about the car and its changed position (Tr 239, 245,246, 250,251), petitioner asked for an instruction on mistaken identity (Tr 291,292; App 1a), which included a statement that petitioner was not required (in effect) to prove the whereabouts of his brother's car during the afternoon of the crime. The latter portion of the charge was refused (Tr 291,292). The conventional instruction given appears at Appendix 2a-4a.

(c) As petitioner was fixing a quilt on the car seat, after having left the Jacksons, he was stopped by two plain-clothes officers, one Otis Fickling and one Boyd Bryant (Tr 165-167). Officer Fickling testified that petitioner was arrested when the officers "went up to the car" and while petitioner was in the car (Tr 99,100). Thereafter, the car was searched without a warrant. During the search, the officers had the keys to the car and petitioner was in police custody (Tr 95,96, 99,100). Objection was made to the introduction of exhibits found during the search (Tr 88, 110-112), but the motion to suppress such evidence was denied (Tr 113).

## STATUTES OR RULES INVOLVED

## STATEMENT OF POINTS

(1) The alleged "line-up" and surrounding circumstances induced an identification irrespective of the witness' objective judgment, in violation of appellant's right to due process under the Fifth Amendment. (Tr 36-64, esp. 45, 46, 52, 56-64; 79, 127-133, 170-173, 256, 257)

(2) The Trial Court's refusal to instruct the jury that petitioner was not required to prove that another person may have committed the crime violates the principles set out by this Court in Salley v. U.S., 353 F2d 897 (1965). (Tr 77-100, esp. 93-100; 103-106, 109, 112, 117, 138-141, 144-146, 152,153, 160-173, 180, 185, 186, 239-242, 245,246, 250,251, 256,257; 276-293, esp. 285, 286, 291, 292)

(3) The Trial Court's refusal to suppress the evidence obtained during the unlawful search of the car was a violation of the search and seizure principles set out by the U. S. Supreme Court in Preston v. U.S., 376 US 364 (1964). (Tr 88-92, 94-96, 99-106, 110-113, 133-135, 165-167, 169, 225-227, 232)

## SUMMARY OF ARGUMENT

(1) The Government's eyewitness Vines, standing in her second floor apartment, observed two Negro males who came out of the basement get into an automobile and drive away with some of the stolen property.

She was taken to a police station beside which she saw the automobile used by the two Negroes. She was taken into the detectives' room in which there were two Negro police officers and defendant. A police officer asked defendant to stand and turn around, whereupon Vines identified him as one of the Negroes at the scene of the crime.

The prosecuting attorney led Vines to say that she picked defendant out of a "line-up".

The circumstances accompanying Vines' experience and "identification" induced her to make such identification without appropriate safeguards, and the use thereof at the trial was unfair and a violation of due process under the Fifth Amendment. The induced or planted identification disabled the witness from making a fair or objective identification. Palmer v. Peyton, 359 F2d 199, En banc (4 Cir, 1966) is directly in point.

(2) Defendant testified that during the time of the crime he was at the home of the Jacksons. The Jacksons corroborated this. There was no contradiction. Defendant testified that the automobile, belonging to his brother, had been moved since defendant parked it in front of the Jackson's apartment with the keys in the ignition. Assuming truth of the foregoing, an unknown person or persons used the car in commission of the crime.

The prosecuting attorney ridiculed defendant's testimony that the car had been moved on the ground that a thief would not have returned it to the same general area.

Defendant's attorney requested a specific instruction that defendant need not prove that someone else may have committed the crime, but the instruction was refused and only the conventional instruction was given, despite the requirements laid down by this Court in Salley v. U.S., 353 F2d 897 (US App DC, 1965).

(3) The arresting officer, Fickling, testified that he arrested defendant while defendant was in the car of defendant's brother. From that moment on, defendant was in police custody and offered no resistance. There was no suggestion of a weapon nor was any of the evidence of a nature that might be destroyed. Despite the lack of any urgency, Officer Fickling and his companion, Officer Bryant, searched not only the interior of the car, but the trunk as well, without obtaining a search warrant, contrary to the requirements laid down in Preston v. U.S., 376 US 364 (1964) and contrary to the Fourth Amendment which forbids unreasonable searches and seizures. Hence the District Court erred in not suppressing evidence obtained as a result of that search.

## ARGUMENT

(1) The alleged "line-up" and surrounding circumstances induced an identification irrespective of the witness' objective judgment, in violation of appellant's right to due process under the Fifth Amendment. (Tr 36-64, esp. 45, 46, 52, 56-64; 79, 127-133, 170-173, 256,257)

It is not denied that a line-up, properly conducted, is a legitimate police investigative device. But, any police procedure must meet "those canons of decency and fairness", Malinski v. N.Y., 324 US 401 (1945) that are part and parcel of the fundamental law of our land. The Government may not, therefore, "rely on an identification secured by a process in which the search for truth is made secondary to the quest for a conviction." Palmer v. Peyton, 359 F2d 199, En banc (4 Cir., 1966).

Not only does this question appear to be novel to this Court, it has apparently been ruled upon by only two circuits, the 4th Circuit in Palmer, supra, and the 5th Circuit in Wade v. U.S., 358 F2d 557 (1966) (US App Pndg), involving a defendant's right to have his appointed counsel present during the line-up. The issue in the case at bar, however, is directly analogous to Palmer. Petitioner points to the inherent lack of due process in the line-up to which he was subjected -- a line-up completely void of any pro-

cedural safeguards aimed at obtaining a reliable and objective identification -- and asks this Court to adopt the principles set out by Judge Sobeloff of the 4th Circuit in the Palmer opinion.

The Government witness in the Palmer case was asked to identify a voice. She did not see the defendant, and was earlier subjected to a test line-up in order to ascertain her ability to identify voices. During the actual identification process, however, the only voices she heard were the defendant's and the sheriff's.

Judge Sobeloff said of this procedure:

> "The opportunity for suggestion inherent in the procedure used to secure this identification is manifest. * * * When she was asked if she could identify the voice, the only voice that was submitted for identification, the highly suggestive atmosphere that had been generated could not have failed to affect her judgment. * * * Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have most fertile soil in which to grow to conviction. * * *"

It must be remembered that Mrs. Vines used height as her primary characteristic for identification of the defendant whom she claimed she saw from her second story apartment window. The suggestive aspect of the "line-up" used here is especially evident when one considers that before the "line-up" Mrs. Vines said petitioner was 5'8" to 6'; but after the "line-up", Mrs. Vines never swayed from her

revised estimate of about 6'. Furthermore, it can hardly be supposed and should not be assumed that in dress, height and general characteristics, the two Negro officers in the room were sufficiently similar to petitioner as to permit of any inference of identification from Mrs. Vines "selection". She knew she was taken to the station to view a suspect; she saw the automobile at the station; she conversed with officers in the station; she saw petitioner, a Negro, in a room; petitioner arose and turned around upon request of an officer; no other Negroes were in the room except two officers. She was upset and no doubt eager to help the police. She cooperated with them as she did with the Government at the trial.

In the words of Judge Sobeloff: "In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the /witness/ * * * ."

Not only were petitioner's constitutional rights to due process violated, but the Trial Court abandoned the elementary rules of evidence when it allowed the testimony of Mrs. Vines to go to the jury after the circumstances of the "line-up" were brought out in cross-examination. Trial counsel failed to object to the testimony or ask that it be stricken. But, a trial judge also has a duty to see that

the fundamental rules of decency and fair play are enforced.

If, therefore, petitioner's only objection to Mrs. Vines' testimony was its unreliability or violation of the law of evidence, he would not be raising this issue now. His attorney's failure to object would preclude his appeal on that point. But rules of evidence are not what he relies on today. Petitioner relies on the Fifth Amendment of the Constitution, and the inherent judicial duty to uphold that Constitution, even by a motion sua sponte if necessary.

Petitioner submits, therefore, that there is a difference between gross error during trial, and simple error. Although both give rise to an appeal, simple error has as a mandatory prerequisite, a proper objection at the trial level. What makes gross error an exception is a set of circumstances, which indicate basic constitutional rights were so obviously being violated that the Trial Court should have, at least, recognized and raised the constitutional question. This was not done. Petitioner's right to due process was trampled during trial and such right should rise above mere procedural technicality.

(2) The Trial Court's refusal to instruct the jury that petitioner was not required to prove that another person may have committed the crime violates the principles set out by this Court in Salley v. U.S., 353 F2d 897 (1965). (Tr 77-

100, esp. 93-100; 103-106, 109, 112, 117, 138-141, 144-146, 152,153, 160-173, 180, 185,186, 239-242, 245,246, 250,251, 256,257; 276-293, esp. 285,286, 291,292)

The Salley case holds that (1) a trial judge may not refuse to instruct the jury as to the defendant's theory of the case; (2) defendant is entitled to bring the specific defense of mistaken identity to the jury's attention in an instruction; and (3) the trial judge is not obligated to give the charge in exactly the words requested by defense counsel.

Petitioner's mistaken-identity requested instruction is set forth at Appendix 1a. The Court's instruction is at Appendix 2a-4a.

The instruction requested by the defense in the Salley case read as follows:

> "You are instructed that the identity of the defendant as the person who committed the crime is an element of every crime. Therefore, the burden is on the Government to prove beyond a reasonable doubt not only that the crime alleged was committed, but also that the defendant was the one who committed it.
>
> " * * * You must be satisfied beyond a reasonable doubt of the accuracy of the witness' identification of the defendant.
>
> "In this regard, you are instructed that it is not necessary for the defendant to prove that another person may have committed the crime, nor is the burden on the defendant to prove his innocence. If facts and circumstances have been introduced into evidence which raise a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you should find the defendant not guilty of the offense.

The instruction given in the Salley case was as follows:

" * * * defendant denies that he made any such sale and takes the position that if Officer Brooks did buy these six capsules on September 3rd, he must have bought it (sic) from someone else. * * *

" * * * Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

"I repeat, the burden is on the Government to prove the defendant's guilt beyond a reasonable doubt. * * *

"If you find by proof beyond a reasonable doubt that the defendant sold the drug involved in this case to Officer Brooks on September 3rd, and the other elements of the offenses are proven beyond a reasonable doubt, you may find the defendant guilty. If, however, you find that the defendant did not make the sale, of course, you will find the defendant not guilty on each count. And if you have a reasonable doubt as to whether defendant did or did not make the sale, you will also find the defendant not guilty."

Petitioner submits that there is no substantial difference between the instruction requested in Salley and the one he requested. Similarly, there is no substantial difference between the instruction given in Salley and the one given here. Just as in Salley, the Trial Court in petitioner's case refused to give that portion of the requested instruction which specifically said defendant did not have to prove his innocence or that another may have committed the crime.

The difference between the two cases rests in the surrounding circumstances. Apparently, the requested instruc-

tion in Salley was a precautionary matter. In petitioner's case, however, it was not just a matter of precaution, but of absolute necessity. The prosecuting attorney had ridiculed the idea that anyone else could have committed the crime and needed correction. Petitioner's situation is an aggravation of the reversible error committed in Salley.

(3) The Trial Court's refusal to suppress the evidence obtained during the unlawful search of the car was a violation of the search and seizure principles set out by the U. S. Supreme Court in Preston v. U.S., 376 US 364 (1964). (Tr 88-92, 94-96, 99-106, 110-113, 133-135, 165-167, 169, 225-227, 232)

" * * * even in the case of motorcars, the test still is, was the search unreasonable." (Preston v. U.S., supra at 367) Mr. Justice Black, speaking for a unanimous Court in Preston, pointed out that contemporaneous searches are justified by a need to seize weapons, prevent assault on officers, prevent escape, prevent destruction of evidence -- "things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control."

"But these justifications," Mr. Justice Black explained, "are absent where a search is remote in time and place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

The same factors that will justify a search incident to an arrest, and that were found absent in Preston, were also absent in petitioner's case. Petitioner was arrested and in custody of the police when the officers searched his brother's auto. The officers had the keys to the car, and complete control over it and the contents. There was plenty of time, and no reason why a warrant couldn't have been obtained.

Petitioner submits that there was no necessity for searching the car without a warrant, and that, therefore, his Fourth Amendment right to be free from unreasonable searches and seizures was violated.

## CONCLUSION

Petitioner asks this Honorable Court to reverse and remand his case to the District Court for a new trial since:

(1) Petitioner was subjected to a "line-up" so lacking in due process that the testimony of Mrs. Lois Vines respecting the identification should not have been admitted into evidence;

(2) The Trial Court's instruction on mistaken identity failed to meet the standards of the Salley case; and

(3) Evidence obtained during an unreasonable search of the car after petitioner was arrested and in custody should have been suppressed.

Respectfully submitted,

A. YATES DOWELL, JR.
1345 Pennsylvania Ave., N. W.
Washington, D. C. 20004

Counsel for Appellant
(Appointed by this Court)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| v. | ) | Criminal No. 887-65 |
| | ) | |
| ROOSEVELT WRIGHT, JR., | ) | |
| | ) | |
| Defendant | ) | |

DEFENDANT'S REQUESTED INSTRUCTION
No. 1

You are instructed that the identity of the defendant as the person who committed the crime is an element of every crime. Therefore, the burden is on the Government to prove beyond a reasonable doubt not only that the crime alleged was committed, but also that the defendant was the one who committed it.

In this regard, you are instructed that it is not necessary for the defendant to prove that another person may have committed the crime, nor is the burden on the defendant to prove his innocence. If facts and circumstances have been introduced into evidence which raise a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you should find the defendant not guilty of the offense.

Salley v. U.S., No. 19287
U.S. Ct. of Apps., D.C., dec.
Nov. 24, 1965

Excerpts of Proceedings in United States v. Wright
Criminal No. 887-65

EXCERPTS OF INSTRUCTIONS OF THE JUDGE TO THE JURY

Tr 285 In this case the Defendant has testified that he was not present at the time and place that these offenses were committed. His defense is the defense of alibi which is a legitimate and legal and proper defense. Evidence adduced in support of this defense, like all other evidence in the case, should be given such weight and such consideration as you may think it entitled to receive under all the facts and circumstances of the case.

Before you determine anything else in the case you must find that the Government has established beyond a reasonable doubt that the Defendant was one of the men who was present at the time and place of the commission of the alleged offenses. If, after a full and fair consideration
Tr 286 of all the evidence, both direct and circumstantial you should find that the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offenses charged in the indictment, then one of the essential elements of the offense is lacking and it would be your duty to find the defendant not guilty.

If, however, after full and fair consideration of all the evidence, both direct and circumstantial, you find that the Government has proved beyond a reasonable doubt that the defendant was present at the time and place of the commission of the alleged offenses, then you will consider whether or not the Government has also proved every essential element of the offenses here charged which I will undertake to outline to you.

Tr 291 MR. GARTLAN: Your Honor, as far as I can recall that part of your charge which dealt with the subject matter of my requested instruction was pretty much confined to the alibi defense but I don't think it covered my full request.

THE COURT: It went to the whole issue that the Government has to prove his presence there on that occasion.

Tr 292 MR. GARTLAN: Well I still think I am entitled to the Salley case instruction of having the Jury instructed that identification is an element.

THE COURT: It is an element. I said that. I said "Before you determine anything else in this case you must find that the Government has established beyond a reasonable doubt that the defendant was one of the men who was present at the time and place of the commission of this offense."

It couldn't be any more direct a charge on identification than that. "If after full and fair consideration of all the evidence" and so on and so on, "you find that the Government has failed to prove beyond a reasonable doubt that the defendant was present at the time and place of the commission of the offenses charged, then one of the essential elements of the offense is lacking."

I think I have covered that, but you may have your exception.

**BRIEF FOR APPELLEE**

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 20,153**

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ROOSEVELT WRIGHT, JR., APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

---



Cr. No. 887-65

DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
ROBERT KENLY WEBSTER,
*Assistant United States Attorneys.*

## QUESTIONS PRESENTED

1. Is an eyewitness' identification made without benefit of a formal lineup at the precinct a few hours after the crime a denial of due process? If so, does such an identification require reversal where the eyewitness' positive identification at trial was not shown to be related to the precinct identification and where there was, apart from the identifications, ample other evidence to sustain appellant's conviction?

2. Was it reversible error for the court to refuse to instruct the jury that appellant did not have to prove that another person may have committed the crimes where the court did instruct that (a) the government had the burden of proof (nine times); (b) appellant's defense was alibi; (c) identity was an element of the case; (d) the government had to prove each element beyond a reasonable doubt; and (e) "The Defendant does not have to prove his innocence"?

3. Was there a lawful search of an automobile trunk, made contemporaneously with, and at the scene of, a valid arrest in the car, where the object sought was a large Hi Fi set, other fruits and possible instrumentalities of the crime were in plain view on the rear seat of the car and appellant admitted constructive possession of the car during the time the crime was committed nearly an hour earlier.

## INDEX



## TABLE OF CASES



*Cases chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,153

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*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

On February 10, 1966, following a three day trial by jury, appellant was convicted under a two count indictment for housebreaking (22 D.C. Code § 1801) and grand larceny (22 D.C. Code § 2201). He was sentenced to imprisonment for concurrent terms of from three to nine years, and now appeals.

On the sunny warm day of Wednesday, June 16, 1965 Miss Norma Sword left her apartment, where she lived alone, and proceeded at 7 a.m. to her job at NASA (Tr. 18-20, 56, 210). At about 2 p.m. a neighbor's phone call

summoned her home and she returned within the hour to find that her third floor apartment door had been "forced open" and the lock broken (Tr. 20, 21, 28, 33). The police, whom she had called from her office, were already there (Tr. 33). Missing from their early morning repose were her "stereo" set and her extensive collection of "around 150" records for which the insurance company eventually paid her a "lump sum" of $1200 (Tr. 21, 31). Also stolen were the contents of her oversized, 14 inch, beer barrel "piggybank", estimated to be about one-third full of pennies and fifty cent pieces (Tr. 22, 30).

Mrs. Lois M. Vines, a second floor neighbor, was distracted by knocking noises emanating from Miss Sword's apartment sometime between 1:30 and 2 p.m. (Tr. 37, 38, 46). About five minutes later she saw appellant and another exit from the basement, enter a green, two-door, 1956 Plymouth automobile and drive away (Tr. 38-41, 47). She first checked Miss Sword's door and, finding it open, proceeded downstairs where she saw the Hi Fi set standing out "next to the garbage room" (Tr. 41, 42). Upon seeing the car returning down the street, she retreated into her apartment and from her undiscovered vantage witnessed appellant, whom she twice positively identified at trial, and his accomplice load the Hi Fi set into the car (Tr. 40, 42-45). She jotted down the license plate number 9 KG 30 (Tr. 43-44) and mentally noted that appellant wore a black leather jacket, a cap and white tennis shoes (Tr. 44). She was also able to provide a physical description of the two men (Tr. 44-5, 79-80).

Private Otis Fickling, working in a tactical squad cruiser, received a radio lookout at about 2:25 p.m. containing a description of appellant, his accomplice and the get-away car, including its tag number (Tr. 77-80). Within minutes he spotted the empty car parked about ten blocks from the scene of the housebreaking (Tr. 80, 85, 124). Shortly thereafter appellant came out of a nearby building and got into the driver's seat (Tr. 80-82). As he was placing the key in the ignition he was asked by Officer Fickling and his partner, Detective Boyd Bryant,

for his operator's permit and the vehicle's registration (Tr. 82). Unable to produce the registration, appellant explained that the car belonged to his brother from whom he had borrowed it since noon of that day (Tr. 82). Officer Fickling observed in plain view on the rear seat of the car the following: several records which were later positively identified by the presence of Miss Sword's nickname, "Tex", in her own handwriting, and by the last name of a friend, Penny King (Tr. 25, 82); a brown bag containing pennies; two large screw drivers; and a pair of black gloves, which Mrs. Vines testified resembled the type of gloves she saw one of the men carry out of the basement along with a paper bag (Tr. 64-67, 86, 91). Thereupon appellant was warned of his rights and arrested (Tr. 82, 84-5, 99).

Not seeing the Hi Fi set "which was supposed to have been on the back seat of the car", the officers immediately searched the locked trunk of the car, recovering only another screwdriver and another pair of gloves (Tr. 91-2, 96). The officers then accompanied appellant to the nearby apartment of Mr. Carol Jackson who alleged appellant's recent presence there for the past hour and a half and volunteered that he "didn't bring anything" with him (Tr. 94, 97, 117-19).

Appellant was then taken to No. 11 precinct where Mrs. Vines identified him in a room with five or six other people after he was asked to stand (Tr. 45, 56-9, 64, 127-28). The automobile used to transport the desk sized Hi Fi set was impounded and also was taken to the precinct (Tr. 110, 116).

Appellant's defense was alibi. Mr. Carol Jackson testified that appellant came alone and empty handed to his apartment at about 1 o'clock and remained until about 2:30 (Tr. 138, 140, 142). He denied volunteering to the officers that appellant brought nothing with him when he first arrived (Tr. 148-49). He was impeached with a larceny conviction (Tr. 151). Mr. Jackson's wife, Claudia, supported her husband's testimony that appellant had ar-

rived about half an hour before she left for work at 1:30 (Tr. 152-53). She was impeached with two larceny convictions (Tr. 157).

Appellant testified and admitted that the car had been in his possession since he drove his brother, Bernard, to work about 12:15 on the day in question (Tr. 162, 163). His theory that an unknown person took the car and committed the crimes while he was socializing with Mr. Jackson was rooted in his allegation that the car appeared to have been moved a few feet during that time (Tr. 168, 185-86). Accordingly he denied any knowledge of the records, the screwdrivers or the gloves in plain view on the back seat of the car (Tr. 187, 189). He admitted, however, knowledge of the pair of gloves in the trunk (Tr. 188) and possession of the bag of pennies which he had taken from his 25 year old brother's piggy bank, purportedly to buy gasoline (Tr. 163, 176, 180, 203). Contrary to Mr. Jackson, appellant claimed to have taken the bag of pennies with him to Jackson's apartment (Tr. 142, 181). Appellant admitted prior convictions for grand larceny and housebreaking (Tr. 192, 197).

Bernard Wright testified that he lent his car to his brother, appellant, after being left at work about noon. (Tr. 205-06). He also corroborated the piggybank explanation (Tr. 207), and the existence of one pair of gloves in the car's trunk (Tr. 221). He identified all three screwdrivers as having come from the tool box in the trunk of the car (Tr. 207).

## SUMMARY OF ARGUMENT

### I

A precinct identification in which the accused is asked to stand up in a room containing about six other persons is not so unreliable as to violate his Fifth Amendment rights to due process. In any event the eye-witness's positive trial identifications of appellant were not shown to have been the product of her precinct identification, and, furthermore, the evidence is sufficient without the identifications to support appellant's conviction.

II

Nine different times the court instructed that the government had the burden of proof. The court also specifically instructed on appellant's theory of defense, which was an alibi established through himself and two other witnesses. In addition, the jury was told that identity was an element of the crimes, that the government had to prove all elements beyond a reasonable doubt and that "The Defendant does not have to prove his innocence." There was no error in the court's refusal to instruct with the precise words that appellant was not required "to prove that another person may have committed the crime."

III

Within an hour after the housebreaking appellant was arrested alone in the get-away car. Some fruits of the crime (phonograph records), together with possible instruments of the crime, were in plain view of the arresting officers, and appellant admitted constructive possession of the car during the time the robbery occurred. An immediate search of the car's locked trunk for a large stolen Hi Fi set was valid under *Adams* v. *United States*, and there was no error in the denial of the motion to suppress.

## ARGUMENT

### I. Appellant's constitutional rights were not violated by his identification at the precinct without a formal lineup.

(Tr. 23, 28, 39, 41, 44-46, 54, 80, 82-83, 124, 164-65, 169-71, 185-86, 190, 284-85)

Appellant's contention that Mrs. Vine's identification of him at the precinct a few hours after the crime somehow violated his Fifth Amendment rights is utterly without merit.

At the outset it should be noted that apart from the identification about which he complains, there was ample

evidence to support appellant's convictions. Within an hour after the housebreaking he was caught in sole possession of the get-away car, positively identified by description and by license number, in which were found some of the stolen phonograph records (Tr. 23, 28, 41, 44, 46, 54, 80, 124). These facts are not in dispute. Well established law recognized that possession of recently stolen articles, when not reasonably explained, may give rise to an inference that the possessor stole the articles.[1] The Court properly instructed that the jury could make this inference (Tr. 284-85). In light of appellant's defense, which strains credulity, the jury could reasonably make the inference. His theory was that during the hour and a half in which he was socializing in the Jackson's apartment, someone fitting his physical description and wearing white tennis shoes similar to those he wore, appropriated his brother's car, committed the housebreaking, and returned the car to almost the exact same parking space leaving behind some of the stolen goods (Tr. 23, 44, 45, 82, 83, 164, 165, 185, 186, 190).

Having failed to raise the issue below, however, appellant has left the record in a deficient condition which does not support his current argument. Mrs. Vines twice positively identified appellant at trial as the man she saw at the scene of the housebreaking (Tr. 39, 45). At no time was she asked or did she say that her court room identification was based on, or influenced by, her identification at the precinct. Thus, even assuming appellant's assertion, no prejudice has been demonstrated. See *Stovall* v. *Denno*, 355 F.2d 731, 735 (2d Cir. 1966) *(en banc)*.

In any event there is no support in the record for the contention that appellant's identification at the police precinct, where he was asked to stand up in a room containing about half a dozen other people, was an indecent or unfair police procedure, as contended (Tr. 127-28, 169-

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[1] The rule has recently been reapproved in this Circuit. *(Claude C.) Scott* v. *United States*, D.C. Cir. No. 19,763, decided October 26, 1966 (inference upheld where possession of stolen automobile established six months after the theft).

71; see App. Br. p. 10). To appellee's knowledge no court has ever held that there is a constitutional right to a line-up.[2] Appellant relies solely on *Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966) *(en banc)*, which is inapposite because it involves a capital conviction resting only upon a voice identification made at the precinct which was not even reiterated at trial.

Appellant's contention is properly structured in the judicial process as a jury argument to erode the weight of the identification; there is no validity in the constitutional attack on the sufficiency of Mrs. Vine's identification. *Stovall* v. *Denno*, *supra* at 735, 738 and cases cited therein.

**II. There was no error in the Court's instructions.**

(Tr. 278, 284-288, 291)

Appellant complains that it was reversible error for the Court not to tell the jury, as requested, that appellant did not have "to prove that another person may have committed the crime" (App. Br. p. 13). He concedes, as he must, that the trial judge is not obligated to give the charge in exactly the words requested by defense counsel. *Salley* v. *United States*, 122 U.S. App. D.C. 359, 353 F. 2d 897 (1965). The record, however, amply demonstrates that the instructions were fair, thorough and covered the theory of the defense; as such they were not deficient.

Appellant misplaces heavy reliance upon *Salley* v. *United States*, which reversed a narcotics conviction for, *inter alia*, failure to give a requested identity instruction where the sole defense was mistaken identity and no alibi was offered. In the instant case appellant received from the Court dignified recognition of his alibi defense as a "legitimate and legal and proper defense" (Tr. 285). Moreover, a modified identity instruction, which was tailored to appellant's needs where identity was an issue

[2] This Court has held that there is no constitutional right to an attorney at a line-up. *(Anthony) Williams* v. *United States*, 120 U.S. App. D.C. 244, 345 F.2d 733, *cert. denied*, 382 U.S. 962 (1965).

but was not determinative (see Argument 1, *infra*), was given to emphasize that one of the "essential elements" the government had to prove beyond a reasonable doubt was that appellant "was present at the time and place of the commission of the alleged offenses" (Tr. 285-86). Appellant's complaint here is dissolved by the Court's warning, repeated nine times, that the government carried the burden of proof as to all elements, one of which it noted, in effect, was identity (Tr. 278, 284, 285, 286, 287, 288, 291). Surely no reasonable man could have thought that appellant had to prove that one other than he may have committed the crime where the Court, in addition to the foregoing instructions, admonished the jury that there is a continuing presumption of innocence and "The Defendant does not have to prove his innocence" (Tr. 278-79).

**III. The search of appellant's automobile trunk immediately after his arrest in the car for housebreaking was valid.**

(Tr. 82, 86, 88, 91, 93-94, 100, 110, 113)

Appellant ascribes error to the denial of his motion to suppress the screwdriver and the pair of gloves taken from the trunk of the automobile at the time of his arrest (Tr. 88, 113). He does not contest the seizure of the other two screw drivers, the other pair of gloves and the records seen on the back seat of the car before his arrest, which are clearly admissible under the "plain view" doctrine[3] (Tr. 82, 86, 91). His current contention was rejected after a full hearing at trial (Tr. 113), and should be rejected now.

The search of the trunk of the automobile conducted at the place of arrest, following "immediately" (Tr. 91) after appellant's arrest in the car for a housebreaking in which a Hi Fi set and about 150 long playing phono-

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[3] See *United States* v. *Lefkowitz*, 285 U.S. 452, 465 (1932) (there is no search where the objects are in plain view); *Cradle* v. *United States*, 85 U.S. App. D.C. 315, 316, 178 F.2d 962, 963 (1949), *cert. denied*, 339 U.S. 929 (1950) (same).

graph records were stolen (Tr. 21, 31, 93, 94, 100) was reasonable, and the issue is controlled by this Court's decision in *Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1965)[4]

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
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FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
ROBERT KENLY WEBSTER,
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[4] It may also be noted that the car, which was impounded by the police (Tr. 110), was an instrumentality of the crime because it was used to transport from the scene of the theft a desk-sized Hi Fi set and approximately 150 long playing phonograph records. Once properly in police custody, which the car was at the time of the search of the trunk, warrant requirements are dissolved.

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# APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS

For the District of Columbia

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No. 20,153

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ROOSEVELT WRIGHT, JR.,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

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Appeal from the United States District Court
For the District of Columbia

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A. YATES DOWELL, JR.

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Washington, D. C. 20004

Counsel for Appellant
(Appointed by this Court)

Cr.No. 887-65

# I N D E X

## TABLE OF CASES



* Cases or authorities chiefly relied upon are marked by asterisks.

# APPELLANT'S REPLY BRIEF

I. The alleged "line-up" and surrounding circumstances induced an identification irrespective of the witness' objective judgment, in violation of appellant's right to due process under the Fifth Amendment.

As appellant views the Government's argument, the contentions are: (1) failure to raise this issue below leaves the record deficient and appellant's argument without support; (2) failure to use a line-up was not prejudicial since Mrs. Vines repeated her identification, without reliance on the station identification, at the trial; and (3) in any event the induced identification did not violate appellant's constitutional right to due process. The Government's argument stands unsupported by either fact or law.

Appellant admits that his trial counsel failed to object to Mrs. Vines' station house identification of him at the trial. But as appellant pointed out in his brief, there is a difference between simple error and gross error, the former requiring an objection but the latter being capable of standing by itself. (Appellant's brief, p. 12-13). Surely constitutional rights of this

import are not so fleeting as to disappear by virtue of a mere oversight by counsel during a trial, especially when the circumstances of the violation have been brought to the Court's attention (Tr 45, 59, 62-64, 79, 128, 132, 170-173). Such an oversight did not prevent the U. S. Court of Appeals for the 2nd Circuit from giving considerable attention to appellant's line-up issue in Stovall v. Denno, 355 F2d 731,734 (en banc).

The Government relies primarily on Stovall. In that case the defendant was taken for identification to the bedside of the woman whom he was accused of stabbing and who was seriously ill. The en banc decision was 5 to 3. The majority struggled with the problem as indicated in its opinion.

However, there are significant differences in the facts of that case and the present case. In Stovall (1) the witness had ample opportunity for close observation; (2) the defendant was taken to her bedside, and implements of the crime were not present which would suggest an identification; and (3) the manner of the bedside identification was brought out by the prosecutor only casually (742).

In sharp distinction, in the present case (1) the witness Vines saw two principals of the crime only fleetingly and at a substantial distance, namely from a second floor window, and she herself was not involved in the crime; (2) Vines was taken to the police station at which she saw the car and must have assumed, if she was not actually informed, that the defendant was found in possession of it; (3) no necessity for a less than fair procedure was involved nor any reason why the safeguards of a true line-up could not have been used; and (4) despite the obvious inducement of the station house identification, the witness Vines was led by the prosecutor to say that she picked the defendant out of a "line-up", thereby conveying to the Jury a false impression of "fairness" despite facts which would indicate the contrary to those experienced in investigative procedures, but not, necessarily, to a jury.

Under all the circumstances, the reasoning in Palmer v. Peyton, 359 F2d 199 (en banc 4 Cir 1966) is applicable. Clearly, Vines' identification at the police station was induced and unfair, was represented

to the Jury as fair, and her identification at the trial must have been psychologically colored by the police station identification.

For the Government to deny that the police station identification had any effect on the identification at the trial is to blind itself to realities. Certainly there was a "reasonable possibility" that the evidence complained of might have contributed to the conviction, Fahy v. State of Connecticut, 375 US 86-87, 84 S Ct 230.

Both Palmer and Stovall recognize the right to due process in regard to identifications. There may not be a per se constitutional right to a line-up, but there is a constitutional right to have an identification conducted in accordance with due process standards. Under certain circumstances, due process may demand a line-up.

It should be noted that the Government's claim that Palmer is inapposite misconceives the Palmer holding. Judge Sobeloff did not base his opinion on the fact that this was a capital case. Neither was it grounded on the fact that the identification was not

repeated during the trial. The reasoning rests on the police procedure's inducement of an identification of the suspect's voice. The case is particularly applicable to appellant since in both cases the identifying witness was exposed to a suggestive atmosphere and relied on one aspect of the personality. In Palmer, it was a voice; in appellant's case, a distant viewing primarily based on height. Absent the police inducement, it would be only a matter of conjecture whether Mrs. Vines could have turned her fleeting glance of two men into a solid identification of appellant.

Finally, there is no way to prevent the violation of due process through repetition of an induced identification without banning that identification during trial. Just as the right to be free from unreasonable searches and seizures cannot be protected without suppressing evidence obtained by violating that right, the right to due process in an identification procedure cannot be protected without suppressing the identification obtained in violation of that right.

II. The Trial Court's refusal to instruct the Jury that appellant was not required to prove that another person may have committed the crime violates the principles set out by the Court in Salley v. U.S., 353 F2d 897 (1965).

Appellant's reliance on Salley v. U.S., 122 US App DC 359, 353 F2d 897 (1965), rather than being misplaced as the Government contends, is particularly apt as the Government's brief demonstrates. In Salley, it was the sole reliance on a mistaken identity defense which warranted the special instruction. Due to the Government's constant and improper characterization of appellant's alibi defense as "strains credulity" (Government's brief, p. 6), appellant realized that the Jury would not be able to make an objective evaluation of his alibi defense. Consequently, he was forced at the last minute to attempt to bring to the forefront the underlying theme in his defense, namely, mistaken identity.

The Salley instruction was particularly tailored to his needs. It was, however, rejected. In that case the Court recognized that a jury can listen to legal platitudes about who has the burden of proof without

comprehending what this means in relation to the case at hand. All appellant asked for in the present case was the statement of this very connection between legal principle and the case at hand. It is this type of connective instruction that this Court approved in Salley, and that appellant was denied.

III. The search of appellant's car without a warrant after his arrest and after the police had the keys and complete control over the car and its contents violated appellant's Fourth Amendment right to be free from unreasonable searches and seizures.

The Government contends that Adams v. U.S., 118 US App DC 364, 336 F2d 752 (1964), cert. denied, 379 US 977 (1965) controls. Appellant requests that this Court reconsider its Adams holding.

Appellant in Adams made the same argument this appellant now makes. This Court said then:

> "We recognize, of course, the logic in appellant's argument. After his arrest there was no danger from unseen weapons or of evidence disappearing from the locked trunk of the car. The status quo with respect to the

> trunk could have been maintained until a search warrant was issued, particularly since the car itself was impounded by the police. Cf. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948). But as far as we are aware, no court has yet held that a car, including its trunk, may not be searched without warrant at the time and place its occupants are placed under lawful arrest. We are not persuaded that we should be the first court to do so." (336 F2d at 753)

The U.S. Supreme Court decisions support appellant. U.S. v. Lefkowitz, 285 US 452 (1932); McDonald v. U.S., 335 US 451 (1948); Trupiano v. U.S., 334 US 699 (1948); Johnson v. U.S., 333 US 10 (1948). (The last three citations appear in Chief Judge Stephens' dissent in Cradle v. U.S., 85 US App DC 315, 178 F2d 962,965 (1949), cert. denied, 339 US 929 (1950), cited in the Government's brief.)

The "plain view" doctrine may have allowed the police officers to pick up visible items. But, this did not mean the entire car was fair game. The Government's argument is the same as that made by the Government in Lefkowitz, wherein the contention was (1) the "plain view" doctrine authorized a search of the entire premises; and (2) since the arrests were lawful, the search of the place where they were made

was lawful, and that, having the right to search, the officers were bound to do it thoroughly.

Without dissent or separate concurrence, the Supreme Court rejected this two-pronged argument. A seizure under the "plain view" doctrine is not a search. It is a mere seizure of visible contraband or weapons. Thus, searches and seizures must be distinguished from a mere seizure under the "plain view" doctrine. U.S. v. Lefkowitz, 285 US 465.

Secondly, an arrest warrant is not a search warrant. A search incident to an arrest is not automatically as valid as the arrest. Each must be viewed and judged separately. As C. J. Stephens pointed out in his dissent in Cradle, McDonald established the rule that--and cited Trupiano and Johnson in support of it-- "in all searches and seizures by police officers there must be a lawful search warrant unless the officers justify the absence of such a warrant by exceptional circumstances, for example the imminence of immediate harm or of immediate removal or destruction of property which could be used as evidence." Cradle v. U.S., 85 US App DC 315,323; 178 F2d 962,970.

Moreover, the majority in Cradle noted in spite of the conclusion it reached that "The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person... " (85 US App DC at 317)

The only real dispute here is what are "appropriate circumstances"? The Supreme Court said in Lefkowitz (at 464): "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." The Supreme Court reaffirmed this principle in Preston v. U.S., 376 US 364 (1964) when it struck down a search of a car in police custody at a police station. The Supreme Court reiterated that the "right to search and seizure without a search warrant extends to things under the accused's immediate control... " (at 367). What makes the search too remote to be an incident of an arrest is not a mere time and place remoteness as the Adams case construed Preston, but a time and place remoteness caused by the suspect's loss of control over the car

and the substitution of police control. Preston was not the result of a mere passage of time and coverage of miles after arrest. The crucial element in Preston was control. Could anyone possibly believe that the same result would have been reached in Preston had the car been under the control of the suspect's cohort? Place the suspect's control back over the car and there is then the exceptional or "appropriate" circumstance needed to justify a warrantless search.

In the case at bar there was no urgency requiring immediate search. The officers had arrested the suspect and were not in pursuit of another. They took their time to question Jackson and to take the suspect to the station. There was no reason why a search warrant could not have been obtained in these circumstances without any hindrance to the investigation.

Appellant respectfully asks this Court to overrule Adams and to reconsider its position on searches incident to arrest in view of the consistent Supreme Court holdings in Johnson, McDonald, Lefkowitz, Trupiano and Preston.

A. YATES DOWELL, JR.

Counsel for Appellant
(Appointed by this Court)